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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1396

CARMINE LOMBARDOZZI,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated: February 25, 1971

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The Petitioner, Carmine Lombardozzi, prays that a Writ of Certiorari issue to review the judgment and opinion entered on January 28, 1971, by the United States Court of Appeals for the Second Circuit, in the proceeding entitled United States of America, Plaintiff-Appellee v. Carmine Lombardozzi, Defendant-Appellant, Docket No. 35184.

Opinions Below

The judgment and opinion of the Court of Appeals for the Second Circuit, not yet reported, appears in the Appendix at Page A1.

Jurisdiction

The judgment and opinion of the Court of Appeals was entered on January 28, 1971. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Question Presented

Whether it was proper for the Circuit Court of Appeals, in reviewing a determination of the District Court, to refuse to allow the pre-sentence withdrawal of a guilty plea where that plea was solely motivated by unfulfilled promises made by Government agents.

Statutory Provisions Involved

Title 18, United States Code, Section 371 states in part:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more that $10,000 or imprisoned not more than five years, or both."

Rule 32(d) of the Federal Rules of Criminal Procedure states in part:

> "A Motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

Constitutional Provision Involved

The Constitution of the United States, Amendment V

> No person shall . . . be deprived of life, liberty or property, without due process of law . . .

Statement of the Case

The Petitioner, Carmine Lombardozzi, his brother Daniel Lombardozzi and eleven other named defendants were indicted in a two count indictment charging the substantive offense of causing a stolen check, worth more than $5,000, to be transported in interstate commerce in violation of Title 18 United States Code, Sections 2314, and 2, and for conspiring to cause the same check to be transported in interstate commerce in violation of Title 18, United States Code, Section 371.

On March 12, 1969, during the trial and before the Government had rested, the Petitioner, Carmine Lombardozzi withdrew his not guilty plea and entered a plea of guilty to the conspiracy count of the indictment. Prior to the Petitioner's sentencing, a motion was filed on his behalf to withdraw the guilty plea previously entered. The reasons upon which the Petitioner based this motion were certain unfulfilled promises made by the Government which induced the petitioner to plead guilty. The "promises" made by the Government to the Petitioner were that the Government attorneys would insure that the Petitioner's brother Daniel, a co-defendant in the instant Indictment, would not be imprisoned and that the Petitioner after his guilty plea would not serve any prison time in addition to the sentence yet to be imposed by the New York State Supreme Court on a perjury conviction.

Reasons for Granting the Writ

The Petitioner's guilty plea was solely motivated by unfulfilled promises made to the Petitioner by Government agents and was therefore not made voluntarily.

The instant Petition presents a very important question regarding the proper administration of Federal criminal justice. It is respectfully submitted that the Court below has misapplied Constitutional standards for determining the voluntariness of a guilty plea and by so doing has abridged the rights of the Petitioner; rights which decisions of this Court have sought to protect. It is abundantly clear that a plea of guilty to be valid must be voluntarily made. *United States Ex Rel. Rivera* v. *Follette,* 395 F. 2d 450 (2nd Cir. 1968); *Machibroda* v. *United States,* 368 U.S. 487 (1962); *Waley* v. *Johnston,* 316 U.S. 101 (1942); *Kercheval* v. *United States* 274, U.S. 220 (1927); *United States Ex Rel. McGrath* v. *La Vallee* 319 F. 2d 308 (2d Cir. 1963).

The Petitioner contends that this plea of guilty was solely motivated by promises and assurances by the Government that the sentence to be imposed in the Federal Court would be concurrent to and not exceed the State Court sentence.

These assurances are evidenced by the testimony of Daniel Kinnaly, Special Agent of the Federal Bureau of Investigation, at the hearing on the Petitioner's motion to withdraw his plea. Daniel Kinnaly represented himself to be the agent of the prosecuting attorney, Mr. Holman, in his dealings with the Petitioner, who was led to believe that Agent Kinnaly's representations and the attitude of Mr. Holman were one and the same. At Page 213 of the Appendix, Agent Kinnaly testified:

> "A. And I . . . There's no question in my mind that I must have convinced him, that I was speaking for Mr. Holman when I wasn't . . ."

With respect to the Petitioner's belief that his Federal sentence would be concurrent with his yet to be imposed State sentence Agent Kinnaly testified at the hearing:

> "Q. You told him he wouldn't get any more time either, than the state, right? A. I believe I did, yes, sir." (A-189)*

And further during cross examination:

> "Q. During the conversation that took place before he entered the plea, that is before that time on March 12th, did you tell him he would get a concurrent sentence? A. Yes sir." (A-212)

These negotiations between the Petitioner and Agent Kinnaly were held outside the presence of Petitioner's counsel. In fact, Mr. Holman's testimony reveals that counsel was never consulted with respect to these conversations.

The Government's motive in inducing the Petitioner to plead guilty is evidenced by testimony at the hearing relating to Petitioner's obtaining for the Government a $1,500.00 check allegedly forged by the main Government witness and an agreement that neither the Petitioner nor his brother would testify at the trial. The value to the Government of the check and agreement that neither the Petitioner nor his brother would testify was obvious. The check in the possession of other defense counsel would impeach the credibility

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* "A" refers to the Appendix in United States Court of Appeals for the Second Circuit.

of the Government's main witness. Further the Petitioner's testimony and that of his brother could have been extremely helpful to defense counsel.

The reasons therefore why the Government had such an extraordinary interest in securing the guilty plea become abundantly clear. This agreement between the Petitioner and the Government remains uncontradicted in the record. The Petitioner in fulfilling his part of the bargain did turn over to the Government the check in question and neither he nor his brother testified at the trial then in progress.

Petitioner further submits that the manner in which the Government acted casts suspicion upon the entire proceeding.

The Trial Court recognized, in denying the Petitioner's Motion to withdraw his guilty plea, that:

> ". . . a great deal was said to the defendant by Mr. Holman and Mr. Kinnaly that was ill-advised, and that may well have produced in Mr. Lombardozzi one plain impression, and that was if he pleaded gulty, Mr. Holman and Mr. Kinnaly would be wholly in his corner and would do their level best to see to it that he got a concurrent sentence and that the matter would in the end be reposed in the hands and control of the Attorney General, and Mr. Lombardozzi was aware that Mr. Holman was connected with the Attorney General's office and if he had any authority to speak for the Government-derived his authority from his position as a member of the Attorney General's Staff." (A-346-347)

The opinion of the Court of Appeals relies upon this Court's recent decision in *Brady* v. *United States,* 397 U.S.

742 (1970). The Petitioner questions the Court of Appeals' interpretation and application of Brady and companion cases, *McMann* v. *Richardson,* 397 U.S. 759 (1970) and *Parker* v. *United States,* 397 U.S. 790 (1970) in the instant proceeding.

The above cited cases hold that a guilty plea is not involuntary if it is based on competent advise of counsel as to the admissibility of a confession or as to the validity of a possible death sentence after conviction by a jury even if subsequent Supreme Court decisions render the confession inadmissible or the possible death sentence invalid.

The Petitioner vigorously maintains that the judgment and opinion of the Court of Appeals is diametrically opposed to the Constitutional standards that must be applied to pre-sentence withdrawal of guilty pleas. As Mr. Justice White stated in *Brady, supra*

> "The standard as to the voluntariness of guilty pleas must be essentially that defined by Judge Tuttle of the Fifth Circuit Court of Appeals:
>
> > '[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes).' "

In the instant case there is ample evidence that the Petitioner's plea was induced by "misrepresentation including unfulfilled or unfulfillable promises" made by

the Government's prosecutorial team, and was therefore not voluntary. In order that this Court may remedy the Court of Appeals' misapplication of these critical principles of law it is respectfully urged that a review of the judgment below is required.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted

JAMES M. LA ROSSA
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New York, New York 10006
Counsel for Petitioner

February 25, 1971

APPENDIX

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 277—September Term, 1970.

(Argued December 14, 1970 Decided January 28, 1971.)

Docket No. 35184

UNITED STATES OF AMERICA,

Appellee,

—v.—

CARMINE LOMBARDOZZI,

Defendant-Appellant.

Before:

MOORE, KAUFMAN and HAYS,

Circuit Judges.

Appeal from an order of the United States District Court for the Eastern District of New York, John F. Dooling, *Judge,* denying appellant's motion to withdraw his plea of guilty.

Affirmed.

JAMES M. LAROSSA, New York, N. Y., *for Appellant.*

GERARD T. MCGUIRE, Special Attorney, United States Department of Justice (Edward R. Neaher, United States Attorney, Eastern District of New York, Daniel P. Hollman, Special Attorney, United States Department of Justice, on the brief), *for Appellee.*

HAYS, *Circuit Judge*:

This is an appeal from an order of the United States District Court for the Eastern District of New York denying appellant's motion under Rule 32(d) of the Federal Rules of Criminal Procedure to withdraw his plea of guilty. Appellant pleaded guilty to conspiring in violation of 18 U.S.C. §371 (1964) to transport in interstate commerce a check having a value in excess of $5,000 knowing it to have been stolen, a crime under 18 U.S.C. §2314 (1964). Appellant was sentenced under 18 U.S.C. §4208(a)(2) (1964) to the custody of the Attorney General for a term of two years.

Appellant Carmine and his brother Daniel Lombardozzi, along with ten other defendants, were indicted for theft of a customer's check from Orvis Brothers, a New York brokerage firm. The indictment alleged a scheme to deposit stolen checks in bank accounts under the name Orvis Brothers and then to withdraw the proceeds once the checks had cleared. There were two counts, one for transporting a stolen check in violation of 18 U.S.C. §2314 and §2 (1964), the other for conspiring to cause the same check to be transported in interstate commerce in violation of 18 U.S.C. §371 (1964).

After trial had begun and the principal government witness had implicated both appellant and his brother

Daniel Lombardozzi, appellant approached the government attorney and indicated his desire to plead guilty to the conspiracy count.

Transcripts of three conferences held in the chambers of the trial judge show that appellant initially sought to obtain a dismissal of the indictment as to his brother Daniel and an assurance that his own sentence would be concurrent with a sentence about to be imposed by a New York State court after a conviction for perjury. At the second meeting, appellant sought a suspended sentence with probation for his brother and, again, a federal sentence concurrent with the state sentence for himself. The judge stated at this meeting and at the third meeting, attended by counsel, appellant, and his brother, that it was "unlikely, in the extreme" that probation would be granted to Daniel Lombardozzi and that he would neither direct that appellant's sentence be concurrent with the state sentence nor recommend such a procedure to the Attorney General. The court said only that it would impose sentence in such a way as to leave to the Attorney General's discretion whether to make the federal sentence concurrent with the state sentence. Appellant expressed himself as satisfied with this disposititon. Before accepting the Lombardozzis' guilty pleas, the judge read the charge to the defendants, questioned them about it, and satisfied himself that they understood the charge and also understood that it was within the court's power to impose a maximum prison term of five years and a fine. In response to the judge's questions defendants stated that no threats prompted their pleas, that there were no "inducements" of which the court had not been informed, and that they were in fact guilty. The pleas of guilty were then accepted.

Before appellant was sentenced but after Daniel Lombardozzi had been sentenced to two years imprisonment, appellant made a motion to withdraw his plea of guilty on the ground that he was not guilty of the crime to which he had pleaded and that his plea was involuntary because the government attorney had assured him that the court would recommend a concurrent sentence to the Attorney General and that he would not have to serve any time in a federal penitentiary.

The judge who had taken appellant's guilty plea conducted a hearing on the motion at which the Assistant United States Attorney who was in charge of the prosecution and one Daniel Kinnaly, Special Agent of the F.B.I., testified as did appellant. Although he found much of what the Assistant United States Attorney and Kinnaly had said to appellant to be ill advised, the judge denied appellant's motion on the ground that his plea was not involuntary in view of his general sophistication and intelligence and of the fact that he had indicated clearly that he understood that whether his sentence would be concurrent with the state sentence was to be left wholly to the Attorney General's discretion. The court found that the appellant was under no "illusion that he was going to avoid spending time in a federal prison."

Appellant contends that the district court erred in denying his motion because the government's promise that his state and federal sentences would be concurrent was the sole motivating factor for his plea and that the plea was therefore involuntary. Although promises or threats may deprive a guilty plea of its free and voluntary character, rendering it void, *Machibroda* v. *United States,* 368 U.S. 487, 493 (1962), this does not mean that a prosecutor's promise to recommend leniency necessarily has that result,

United States v. *Malcolm*, 432 F.2d 809, 814 (2d Cir. 1970). The opinion in *Brady* v. *United States*, 397 U.S. 742, 749 (1970) makes it clear that a guilty plea is the product of many factors and that its voluntariness can be determined only by weighing "all of the relevant circumstances."

The record shows that the appellant himself initially approached the Assistant United States Attorney and said "I would like to take a plea of guilty to this indictment." This he did after he had heard the testimony against him of the government's principal witness which implicated him in a crime carrying a maximum sentence of fifteen years. Appellant was not an uncounseled, uneducated defendant unfamiliar with the workings of the criminal law but rather a sophisticated and intelligent man. The evidence adduced at the hearing on the motion supports the judge's finding that the appellant calculated his position and made a rational decision to plead guilty.

The fact that the plea was accepted only after a series of three transcribed conferences with the judge and appellant's counsel present tends to "dissipate" the "coercive impact" which might have resulted from the prosecutor's promises to recommend leniency. *Brady* v. *United States*, *supra* at 754; *United States* v. *Malcolm*, *supra* at 814. The judge made it entirely clear that he would make no recommendation to the Attorney General and that whether the sentences would be concurrent would be left wholly to the discretion of the Attorney General.

In light of all these factors, we can hardly accept appellant's claim that he falls within the category of defendants "so gripped by . . . hope of leniency that [they] . . . could not, with the help of counsel, rationally weigh the advantages of going to trial against the advantages of pleading guilty." *Brady* v. *United States*, *supra* at 750.

The evidence clearly supports the lower court's conclusion that appellant's own calculation of the possibilities and risks involved as well as the actual value of any commitments made to him by the prosecutor motivated his plea of guilty.

On a pre-sentence motion for withdrawal of a guilty plea, it is entirely proper for the court to consider the prejudice to the government which would result from granting the motion. *United States* v. *Stayton,* 408 F.2d 559, 561-62 (3d Cir. 1969); 8A Moore's Federal Practice ¶32.07 (1970). In the present case the court pointed out the substantial prejudice to the government which would have resulted from a granting of appellant's motion:

> "The defendant entered his plea after he heard Negri [the principal government witness] testify.... You do not assemble a case of this kind for trial twice. The problem of double jeopardy, and everything else, would have to be faced. When a plea is taken in the middle of trial, it has to be taken with the utmost deliberation simply because the public's right is going to be compromised if there is something wrong with the plea-taking."

The defendant had the burden of establishing grounds for the withdrawal of his plea, *United States* v. *Giuliano,* 348 F.2d 217, 221 (2d Cir.), cert. denied, 382 U.S. 939, 946 (1965); *United States* v. *Smiley,* 322 F.2d 248, 249 (2d Cir. 1963). The determination of whether that burden has been met rests within the discretion of the trial judge, whose decision is reversible only if clearly erroneous, *United States* v. *Hughes,* 325 F.2d 789, 792 (2d Cir. 1964). The judge found that the appellant failed to meet that burden by establishing any basis whatsoever for withdrawal of his

plea. The findings of the court were supported by ample evidence.

Appellant's claim that the district court incorrectly applied the post-sentence "manifest injustice" standard of Rule 32(d) of the Federal Rules of Criminal Procedure in deciding appellant's pre-sentence motion to withdraw the plea of guilty finds no support in the record.

Affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1396

CARMINE LOMBARDOZZI, PETITIONER

v.

UNITLD STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, his brother, and others were indicted in the United States District Court for the Eastern District of New York for causing the interstate transportation of a stolen check worth more than $5000, in violation of 18 U.S.C. 2314, and for conspiracy to commit that offense, in violation of 18 U.S.C. 371. Near the close of the government's case, after petitioner had been implicated by the government's principal witness Negri,[1] petitioner approached the assistant United States Attorney and said he would like

[1] The trial is described in *United States* v. *Mingoia*, 424 F. 2d 710 (C.A. 2).

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to plead guilty. He was told to consult his counsel. (App. 52–53).[2]

In conferences before the judge on March 7 and 10, 1969 (G. App.), the judge told government and defense counsel that, even though the government did not oppose probation for petitioner's brother and a direction that any sentence for petitioner be served concurrently with a state sentence, he would not agree to impose such sentences (G. App. 3–4, 13, 16, 19, 20). Before petitioner and his brother pleaded guilty on March 12, 1969, the judge made clear to them personally that it was unlikely that he would grant probation to Daniel (App. 24) and that he would leave it to the discretion of the Attorney General whether petitioner's federal sentence would be served concurrently with an anticipated state sentence (App. 32–33). The court conducted a full inquiry under Rule 11, F.R. Cr. P., before accepting the plea to one count of the indictment (App. 35–41).

After Daniel had been sentenced to imprisonment for two years and before petitioner himself had been sentenced,[3] petitioner made a motion to withdraw his plea of guilty on the ground that he was not guilty and that his plea had been motivated by the assurance of government counsel and an F.B.I. agent that he would not have to serve time in a federal penitentiary.

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[2] App. refers to petitioner's appendix in the court of appeals: G. App. to the government's appendix.

[3] Daniel was sentenced in July 1969 (App. 2). Petitioner's sentencing was adjourned at his request (App. 3). The motion to withdraw the plea of guilty was filed in February 1970. (App. 3). Petitioner had been ill during the summer of 1969 while incarcerated under a state sentence (App. 184–186).

(App. 2–3, 8–14). The judge held a hearing on the motion at which government counsel, the F.B.I. agent and petitioner testified. At the conclusion of the hearing, the judge denied the motion to withdraw the plea. The judge found that a great deal was said to petitioner by government counsel and the agent which was ill-advised (App. 346–347), but that petitioner knew what he was doing when he pleaded guilty after the judge had made his own position clear (Pet. 347–348). Noting that he had been particularly frank because the plea had been made in the middle of trial, the judge concluded that petitioner "accepted the risks of his situation with long-headed knowledge that he was in the midst of a difficult situation" (App. 350). On June 12, 1970, the court sentenced petitioner to imprisonment for two years, with eligibility for parole as determined by the Board of Parole, making it explicit that the Attorney General had authority to fix the place of confinement (App. 356–357).[4] The court of appeals found the determination of the district court supported by ample evidence and affirmed (Pet. App. A1–7).

There is no reason to review this factual determination. As the court below held, petitioner was not an uncounseled defendant who could not rationally weigh the advantages of going to trial against the advantages of pleading guilty; he was well aware that the judge was not disposed to accept the recommendations

[4] The judge pointed out that, by the time of sentencing, the question of concurrence was academic since little time remained on the state sentence (App. 349).

of his counsel and government counsel. His plea, knowingly entered with the advice of counsel, was properly found to be voluntary. *Brady* v. *United States,* 397 U.S. 742.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1971.

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